1972

Home Builders Association of Greater Salt Lake v. Provo City, A Municipal Corporation, the State of Utah : Brief of Appellants

Utah Supreme Court

IN THE SUPREME COURT
of the
STATE OF UTAH

HOME BUILDERS ASSOCIATION OF GREATER SALT LAKE, a corporation, ROBERT PEAY AND DON DEAN, d/b/a DEAN & PEAY CONSTRUCTION; C & T CONSTRUCTION COMPANY, a partnership; DUANE HERBERT, d/b/a CROWN CONSTRUCTION COMPANY; J. S. BRADY DIRKER, d/b/a J. S. BRADY DIRKER CO; CLYDE LUNCEFORD; QUINTIN ELDER and L. G. SPARKS, d/b/a L. G. SPARKS CONSTRUCTION COMPANY, for themselves and others similarly situated, and VILLA MARIA, a partnership.

Plaintiffs and Appellants

vs

PROVO CITY, a municipal corporation of the State of Utah.
Defendant and Respondent

Case No. 12819

Appeal from the judgment of the Fourth Judicial District for Utah County, State of Utah, the Honororable Maurice Harding, Judge, Presiding.

BRIEF OF APPELLANTS

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APPELLANT'S BRIEF

NATURE OF CASE

Plaintiffs brought this action for judgment in the amount of sewer connection fees paid pursuant to an ordinance plaintiffs claim to be invalid. The ordinance requires the payment of $100 Sewer Connection Fee per living unit.

DISPOSITION IN LOWER COURT

Plaintiffs moved the court for a Summary Judgment based on the record, depositions and exhibits. The motion was denied, the court concluding that the ordinance in question was valid.

RELIEF SOUGHT ON APPEAL

Appellants seek to have the ordinance in question declared invalid and to have judgment for the amounts paid defendant thereunder.

STATEMENT OF FACTS

In December of 1967, Templeton, Linke and Alsup, Consulting Engineers, filed with Provo City a report which reviewed the wastewater collection system, treatment plant, and proposed a master plan for collection and treatment facilities (see report entitled *Provo City, Utah Review of Present Wastewater Collection System, Present Wastewater Treatment Plant, Proposed Master Plan for Wastewater Collection and Treatment Facilities.*) The report noted problems including: Areas served by 6 inch sewer mains and areas served by sewers of questionable construction; infiltration of ground water into the collection system; improper connection of drain systems and air conditioning systems to the sanitary system; leaks; the production of effluent which does not meet the requirements of the Department of Health. The report recommended (1) a survey of the system, (2) corrections of faults found. $15,000.00 to be spent each year to repair and replace, (3) a study to set up an industrial rate schedule, (4) enlargement of the treatment plant according to the master plan (Phases I through IV) to treat for a population of 150,000.

Seeking a way to partially defray the costs of repair and replacement of the existing collection system, treatment plant enlargement and main trunk line installation, the City relied on the report of Caldwell, Richards and Sorenson, Inc., Engineers, of May 29 1970

(see report entitled *The Development of Sewer Service Charge for Provo City.*) This report recommended a connection charge of $100 for each complete living unit. This figure was arrived at by dividing the number of sewer connections into the net value of the system. The resulting figure of $90 was rounded off to $100.

On August 18, 1970, Provo enacted Ordinance No. 248, which incorporated the suggestions of the Caldwell Report (see Ordinance No. 248 entitled *An Ordinance Amending Chapter* 23.20 *Sewer Connection and use*). *A Portion of the Revised Ordinances of Provo City,* 1964, *as Amended, By Repealing Sections* 23.20.040, *Through and Including Section* 23.20.070 *Having Reference to Permits, Service Connection Fees and Assessments for Sewer Line Installation and Connections*). Under the Ordinance, a sewer connection fee is charged at the rate of $100 for each living unit, i.e. single family $100, duplex $200, and fourplex $400, and a 34 unit apartment $3400. This charge is made without regard to who paid for the sewer line servicing the connecting property.

Prior to the enactment of the Ordinance, builders who constructed and installed the sewer collection system to their property could connect to such system without additional charge. However, if the City had constructed and installed such system then a fee was charged the builder to reimburse the City for such costs. This reimbursement fee is still charged under Ordinance 248, where the City has installed the lines.

Relating to the land being developed, both prior to and after the enactment of Ordinance 248 builders

pay the City a water connection fee ($135 to $500) and a building permit fee; and pay for the costs of water lines and hookup, sewer and hookup, storm sewer system, street construction and surfacing, curbs, gutters and sidewalks. (Deposition of John A. Zirbes, Provo City Engineer, pages 15, 16, 20, 21, 22, 30).

The fund resulting from sewer connection fees is being used and is to be used for partially paying the costs of repair and replacement of sewer collection system, treatment plant enlargement (Phases I through IV) and collector trunk line installation (Deposition of Zirbes,, p. 10, 24, 25). The ordinance is silent as to purpose.

The sewer connection fund money is accounted for together with monthly sewer service fees and Federal grant monies under a fund called the Sewer Disposal Operating Fund. The ordinance has no such requirement and this money could be in the general fund for any City purpose. This Sewer Disposal Operating Fund is used, in addition to the above purposes, for payment of general operating expenses of the sewer system including employee salaries, trucks, equipment and bonded indebtedness, (Deposition of H. Blaine Hall, Provo City Auditor P. 13, 16 and 18).

Provo City Ordinance 60, passed in 1953, provides at Section 9, Paragraph (K), Page 17, for billing and collecting "on the same bill for all water and sewer service supplied by the City's water system, and sewer system." Paragraph (i) provides for the discontinuance of water service to any consumer delinquent for more than 60 days in the payment of sewer charges. Sec-

tion 10 requires connection to the sewer where the building is within 200 feet of a street or way in which a public sewer is in existence, (see Ordinance No. 60 entitled: *An Ordinance Providing for the Construction of Extensions and Improvements to the Municipally owned Sewer System of Provo City, Utah, Authorizing and Providing for the Issuance of* $1,200,000 *Sewer Revenue Bonds of Provo City, Utah, for the Purpose of Defraying Part of the Cost of the Construction of Such Extensions and Improvements; Prescribing the Form and Other Details of Said Bonds; Providing for the Sale Thereof; Providing for the Collection and Deposition of the Revenues of said Utility; Making other Provisions with Respect to Operation of said Utility and the Issuance of said Bonds, and Providing for the Payment of Said Bonds.*)

The City justifies the connection fee on the basis that the new people coming into the City create the sewer problems and the new people should be charged to solve the problems (Deposition of Zirbes Page 39).

ARGUMENTS

POINT I

SEWER CONNECTION FEES MAY NOT BE CHARGED A SEGMENT OF THE POPULATION TO DEFRAY GENERAL GOVERNMENT EXPENSE

The sewer connection fees charged to builders are used in the payment of new collector trunk lines, repair and replacement of existing sewer lines, enlargement of the treatment plant, retirement of bonded indebtedness and general operating expenses of the sewer sys-

tem including employees salaries, and equipment expense. These governmental functions are for the benefit of all the people of Provo and should be paid for by all the people equally. The following cases hold that the cost of city benefits should be borne by the entire community.

Coronado Development Company vs. The City of McPherson, Kansas, 368 P2d 51, State statute provided for the submission of plats to the City Planning Commission and the governing body of the City for approval prior to filing. The statute granted the City Planning Commission power to adopt regulations "governing the subdivision of land, and stipulated that the regulations may provide for the proper area of streets in relation to other existing or planned streets and to the mapped plan for adequate and convenient open spaces for traffic, utilities, access of fire-fighting apparatus, recreation, light, and air, and for the avoidance of congestion of population; including minimum width and area of lots."

Pursuant to this statute, the City Planning Commission adopted a regulation governing subdividing land which required the payment to the City by the subdivider of 10% of the appraised value of platted area for public parks or play grounds and other public areas in the event there were not public open spaces required by the governing authorities. The Court held that,

> . . . "Under our decisions, the rule of law that cities exist only by and through statutes and have only such power as the statute pre-

scribes is well established and of long standing . . . "

It held further that,

> . . . "The exaction of cash payments was a material departure from the statutory authorization and not reasonably related to the regulatory power delegated to the City . . ."

Of similar import is the California case of *Mike Kelber, Plaintiff and Respondent vs The City of Upland, et al, Defendant and Appellant,* 318 *p2d* 561... This case involves the validity of two amendments to the City's Subdivision Control Ordinance. One provided for the payment of $30.00 per lot fee. This fee was to be placed in a Park and School Site Fund to be used for the purpose of acquiring park and school sites. The other ordinance, after requiring drainage structures both inside and outside the subdivision, further provides that in lieu of construction of the drainage structures outside the subdivision, the subdivider pay $99.07 per acre which went into a fund entitled "Subdivision Drainage Fund".

The lower court found that "the provisions of these two ordinances . . . are void and of no force and effect; that the provisions of these ordinances are in conflict with the provisions of the Subdivision Map Act of this state . . ."

The Court here stated that the Subdivision Map Act permits the adoption of local ordinances that are supplemental to and not in conflict with the Act, "and

provided that they bear a reasonable relation to the purposes and requirements of theAct."

The Court held:

> "All the references to local ordinances in the Subdivision Map Act relates to a local ordinance as defined in the statute, and to the design and improvement of subdivisions which are also defined in the statute . . . It rather clearly appears that these fee provisions are fund raising methods for the purpose of helping to meet the future needs of the entire city for park and school sites and drainage facilities, and that they are not reasonable requirements for the design and improvement of the subdivision itself. It seems obvious that this fund raising method is not related to the needs of this particular subdivision or to the matter of making proper connections between this subdivision and the adjoining area; that it is not reasonably required by the type and use of the subdivision as related to the character of local and neighborhood planning and traffic conditions; and that it is inconsistent with and conflicts with the provisions of the Subdivisions Map Act . . .
>
> ' . . . the power to require the payment of large fees or contributions for general city benefits as a condition of the approval of a map may not be reasonably implied, and it is entirely inconsistent with the language and apparent intent of the statute."

Pioneer Trust and Savings Bank vs Village of Mount Prospect, et al, 176 *NE2d* 799: In this case the plaintiffs brought a mandamus proceeding to compel the corporate authorities of the Village of Mount Prospect to approve a plat of a subdivision which complied with all the provisions of the official plan of the municipality except that requiring a dedication of land for public use. A state law authorized municipalities to establish plan commissions with authority to recommend to the corporate authorities the adoption of the official plan. It further provides that the plan may establish reasonable standards of design for subdivisions and for resubdivisions of unimproved land and of areas subject to redevelopment including reasonable requirements for public streets, alley ways for public service facilities, parks playgrounds, school grounds, and other public grounds. It states further that no plat of subdivision shall be entitled to record or shall be valid unless the subdivision shown thereon provides for streets, alleys and public grounds in conformity with the applicable requirements of the official plan.

The Village of Mount Prospect established a plan commission and adopted by ordinance an official plan as recommended by the commission. This ordinance provides that public grounds other than streets, alleys and parking areas shall be dedicated in appropriate locations by the plat (a) at the rate of at least one acre for each 60 residential building sites or family units which may be accomodated under the restrictions applying to the land or (b) at the rate of at least 1/10th acre of each one acre of business or industrial building sites

which may be accomodated under the restrictions applying to the land.

In the instant case, it was established that 6.7 acres of the land sought to be required to be dedicated or donated would be for the use of an elementary school and for the use of the Mount Prospect Park District as an elementary school site and a secondary use as a play ground.

The Court held:

> . . . "We stated in the Rosen case that the statutory provisions with respect to reasonable requirements for street and public grounds were based upon the theory that the developer of a subdivision may be required to assume those costs which are specifically and uniquely attributable to his activity and which would otherwise be cast upon the public. We further observe: But because the requirement that a plat of subdivision be approved affords an appropriate point of control with respect to costs made necessary by the subdivision it does not follow that communities may use this point of control to solve all of the problems which they can foresee . . .
>
> . . . the municipality may require the developer to provide the streets which are required by the activity within the subivision but cannot require him to provide a major thoroughfare the need for which stems from a total activity of the community . . .
>
> . . . There can be no controversy about the obvious fact that the orderly development of a munici-

pality must necessarily include a consideration of the present and future need for school and public recreation facilities . .

. . . the question presented here is one of determining who shall pay for such improvements. Is it reasonable that a subdivider should be required under the guise of the police power regulation to dedicate a portion of his property to public use or does this amount to a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulation?

That the addition by this subdivision of some 250 residential units to the municipality would of course aggravate the existing need for additional school and recreational facilities is admitted by the parties to this cause.

However this record does not establish that the need for recreational and educational facilities in the event that said subdivision plat is permitted to be filed is one that is specifically and uniquely attributable to the addition of the subdivision and which should be cast upon the subdivider as his sole financial burden. The agreed statement of facts shows that the present school facilities of Mount Prospect are near capacity. This is a result of the total development of a community. If this whole community had not developed to such an extent, or if the existing school facilities were greater, the purported needs sup-

posedly would not be present. Therefore, on the record of his case, the school problem which allegedly exists here is one in which the subdivider should not be obliged to pay the total costs of remedying and to so construe the statute would amount to an exercise of the power of eminent domain without compensation.

Section 6 of Article II of the defendant Village Ordinance, imposes an unreasonable condition precedent for the approval of a plat of the subdivision and purports to take private property for public use without compensation."

Fred Morrelli vs City of St. Clair Shores, 96 *NW2d* 144, 355 *Mich.* 575: In this case counsel for the defendant City summarizes the nature of the local problem and its attempted solution in the following terms in his argument upon the Motion to Dismiss:

"The facts, I believe, established that St. Clair Shores as a municipality had some 19,000 people in 1950 and now admittedly somewhere between 50,000 and 60,000 people, so that within the five years period the population has tripled. Exhibit 2 shows the charges that were made and the items which are included in the establishing of the building permit fees. Essentially, we have a party not necessarily a resident of St. Clair Shores applying for a building permit and as such purchasing such special services. In other words in applying the tripling of the population within the five year period if the residents

of St. Clair Shores had their residences there before 1950 or at any time prior to this rapid increase in population, that it would be unfair and inequitable to expect the local residents to bear the costs of special services to be rendered to persons applying for building permits and constructing homes."

Plaintiff's counsel replied as follows:

"The situation is very simply revealed and it comes down to a very simple question. Does the City of St. Clair Shores have the right to assess a special charge against the purchaser of a new home collected from him by indirectly adding to his building costs for providing police protection, fire protection and the taking care of streets."

The City faced with fiscal problems from expansion of its population and the demand for increased municipal services sought a partial solution in an increase of the fee related to building permits.

The increase in permits was arrived at in somewhat the following fashion:

"Those items that we considered were inapplicable to the builders fees we deleted entirely from the costs. Those that we felt might have something to do with overhead and burden was borne by the different departments because of the building activities, we spread over the building activities on a relationship ratio of the expense or overhead burden to the salaries involved in

that particular department. Those departments that had nothing to do with the building activities stood their share on a salary ratio basis of the overhead or straight burden. We tried to apply those expenses equitably . . . "

The Court held:

"What is actually happened here is that the City has sought to charge as costs incurred in administering and enforcing the building code, a substantial part of the increased expenses of City government arising from the growth of the City . . .

. . . These are the public problems of the community and the expenses incurred in their solution are to be defrayed absent valid legislation otherwise providing, from the general revenues of theCity, not on a fee basis under the guise or regulating such matters as plumbing and wiring in new houses.

The police power may not be used as a subterfuge to enact and enforce what is in reality a revenue raising ordinance."

Weber Basin Home Builders Association, Plaintiff vs Roy City, Defendant, filed July 26, 1971: In this case, Roy City increased its building permit fee from $12 to $112 per unit for the purpose of obtaining money for the general fund to improve the City's water and sewer systems needed because of construction of new homes. Our Supreme Court held that the increase placed a disproportionate and unfair burden on new house-

holds in Roy City, as compared to the old ones, in the maintenance of the City government; and was discriminatory and constitutionally impermissible.
Our Court stated:

> "The critical question here is whether the ordinance in its practical operation results in an unjust discrimination by imposing a greater burden of the cost of City government on one class of persons as compared to another, without any proper basis for such differentiation and classification. It is not to be doubted that each new residence has its effect in increasing the costs of city government, nor that due to the steadily increasing costs of everything, including those involved in rendering such services, the City would have authority to raise the fees charged for such services from time to time. Nevertheless, in that connection, the new residents are entitled to be treated equally and on the same basis as the old residents."

POINT II

THE LAWS OF THE STATE OF UTAH DO NOT PERMIT THE CONNECTION FEE EXACTION

In its brief submitted to the trial court, the City relied on *Associated Homebuilders of the Greater East Bay, Inc. vs. City of Livermore,* 366 *P2nd* 448 *and* 10-8-38 *Utah Code Annotated,* 1953, *as Amended.* In the Livermore case, the California court construed Section 5471 of the state law authorized the City to provide by ordinance of a $150 sewer connection fee.

Section 5471 provides:

> "Any entity (defined to include cities by Section 5470, Subdivision (e) shall have power, by an ordinance approved by a two-thirds vote of the members of the legislative body thereof, to prescribe, revise and collect fees, tolls, rates, rentals, or other charges for services and facilities furnished by it, either within or without its territorial limits, in connection with its sanitation or sewerage systems; . . .
>
> Revenues derived under the provisions in this section shall be used only for the acquisition, construction, reconstruction, maintenance and operation of water systems and sanitation or sewerage facilities, to repay principal and interest on bonds issued for the construction or reconstruction of such water systems and sanitary or sewerage facilities and to repay federal or state loans or advances made to such entity for the construction or reconstruction of water systems and sanitary sewerage facilities; provided, however, that such revenue shall not be used for the acquisition or construction of new local street sewers or laterals as distinguished from main trunk, interceptor and outfall sewers."

The court held that such charges fall within the scope of Section 5471 and are authorized as 'fees ... or other charges for services and facilities furnished by (defendant city) . . . "

10-8-38 *Utah Code Annotated* 1953, *as Amended,* provides:

"Boards of commissioners, city councils and boards of trustees of cities and towns may construct, reconstruct, maintain and operate, sewer systems, sewage treatment plants, culverts, drains, sewers, catch basins, manholes, cesspools and all systems, equipment and facilities necessary to the property drainage, sewage and sanitary sewage disposal requirements of the city or town and regulate the construction and use thereof.

Any city or town may, for the purpose of defraying the cost of construction, reconstruction, maintenance or operation of any sewer system or sewage treatment plant, provide for mandatory hookup where the sewer is available and within 300 feet of any property line with any building used for human occupancy and make a reasonable charge for the use thereof. In order to enforce the mandatory hookup to the sewer where available and the collection of any such charge, any city or town operating a waterworks system may make one charge for the combined use of water and the services of the sewer system, including the services of any sewage treatment plant operated by the city or town and may provide by ordinance that application for service from such combined system shall be made in writing, signed by the owner desiring such service or his authorized agent, in which application

such owner shall agree that he will pay for all service furnished such owner according to the rules and regulations enacted in the ordinance of such city or town.

In case an application for furnishing service from such combined systems shall be made by a tenant of the owner, such city or town may require as a condition of granting the same that such application contain an agreement signed by the owner or his duly authorized agent to the effect that in consideration of granting such application the owner will pay for all service furnished such tenant or any other occupant of the premises named in the application in case such tenant or occupant shall fail to pay for the same according to the ordinance of such city or town.

In case any person shall fail to hook up to the sewer where available and in case any applicant shall fail to pay for the service furnished according to the rules and regulations prescribed by the ordinances of such city or town, then the city or town may cause the water to be shut off from such premises and shall not be required to turn the same on again until such person has hooked up to the sewer at his own expense or all arrears for service furnished shall be paid in full.

Cities and towns may sell and deliver from the surplus capacity thereof services of any such system or facility not required by the munici-

pality or its inhabitants to others beyond the limit of the municipality."

The California statute provides for "fees, tolls, rates, rentals or other charges for services and facilities furnished by it . . . in connection with its sanitation or sewerage systems . . ."

The Utah statute provides for "mandatory hookup . . . and . . . reasonable charge for the use thereof. In order to enforce the mandatory hookup . . . and the collection of any such charge . . . (the City) may make one charge for the combined use of water and the services of the sewer system . . . "

It goes on to provide for shutting off the water where there is a delinquency.

Provo has such an arrangement providing for mandatory hookup, one charge for combined water and sewer, and shut off in case of delinquency.

It is submitted the Utah statute in authorizing a reasonable charge for use does not authorize an additional fee for sewer connection to be paid by new residents.

The power to impose a sewer connection tax cannot be inferred from 10-8-30.

In the case of Sanchez vs City of Santa Fe, 481 p2d 401: A state enabling statute authorized an ordinance regarding subdivision regulations to provide for the harmonius development of the municipality and its environs; adequate open spaces for traffic, recreation,

drainage, light and air . . . and other matters necessary to carry out the purposes of the municipal code.

Pursuant thereto, the City passed an ordinance requiring the payment of $50 per lot by the subdivider as a condition to approval of the plat. The sums thus collected were to be placed in a separate special "Public Facilities Purchase Fund" and used only for the purchase or improvements of public facility sites or parts thereof . . . intended to serve the area being subdivided.

The Court held the ordinance unlawful and in violation of State and Federal Constitutions.
The Court stated:

> "Cities exist only by virtue of statutory creation and have only such power statutes expressly confer without resort to implication . . . Having decided that the ordinances in question are not geared for regulation so as to make it a police power, it follows that such a fee requirement is in the nature of a tax. The power to tax is never inferred."

The cases cited under Point I apply here also.

CONCLUSION

Provo City has been and now is charging a monthly sewer service fee to all users of its sanitary sewer system. This is the reasonable charge for the use of such system contemplated by 10-8-38. It further follows the statute by requiring mandatory hookup, one combined billing for water and sewer and water shut off in case

of delinquency. The statute does not authorize an additional fee to be paid.

Land developers pay all the costs and expenses of extending water and sewer mains, installations to the structure, curbs, gutters and sidewalks, in addition to building permit fees and $135 to $500 water connection fee. After hook up with the system, a monthly sewer service fee is paid. It is not proper to charge an additional fee to some users to pay for general community expenses of all of new collector trunk lines, repair and replacement of existing sewer lines, enlargement of treatment plant, retirement of bonded indebtedness and general operation of the sewer system.

It is respectfully submitted Ordinance 248 should be held invalid and plaintiffs should be awarded judgments for amounts paid thereunder.

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